Filed 4/26/10 In re P.R. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re P.R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. P.R., Defendant and Appellant.	F057843 (Super. Ct. No. 07CEJ601664) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Robert H. Oliver and Alvin M. Harrell, Judges.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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On April 8, 2009, a resident alerted to a disturbance in his neighborhood walked outside his house and saw a neighbor of his two houses away holding a rake defending

himself against a person with a knife. Adjudicated a ward of the juvenile court, P.R. argues (1) insufficiency of the evidence of criminal threats with personal use of a deadly weapon, (2) insufficiency of the evidence of assault with a deadly weapon, and (3) abuse of discretion from the juvenile court's failure to consider deferred entry of judgment (DEJ). Solely as to criminal threats with personal use of a deadly weapon, we reverse the judgment. In all other respects we affirm the judgment.

BACKGROUND

On October 23, 2007, the district attorney filed an original juvenile wardship petition against P.R. (Welf. & Inst. Code, § 602, subd. (a)) alleging commission on October 21, 2007, of two misdemeanors – carrying a dirk or dagger concealed upon the person (count 1; Pen. Code, § 12020, subd. (a)(4))[1] and falsely identifying oneself to a peace officer (count 2; § 148.9, subd. (a)). On October 30, 2007, P.R. admitted count 1 and the juvenile court, on the district attorney's motion, dismissed count 2. On November 14, 2007, P.R. was adjudged a ward of the juvenile court and placed on probation.

On December 12, 2007, the juvenile court found P.R. in violation of probation, revoked probation, and reinstated probation until December 12, 2008, with a commitment to Elkhorn Boot Camp. On December 12, 2008, formal probation terminated.

On April 10, 2009, the district attorney filed a subsequent juvenile wardship petition against P.R. (April 10th petition) alleging commission on April 8, 2009, of two felonies – criminal threats with personal use of a deadly weapon, to wit, a knife (counts 1 & 2; §§ 422, 12022, subd. (b)(1)) – and three misdemeanors – brandishing a deadly weapon, to wit, a knife (counts 3 & 4; § 417, subd. (a)) and vandalism (count 5; § 594, subd. (a)(2)). Along with the April 10th petition, the district attorney filed a

[1] Later statutory references are to the Penal Code unless otherwise noted.

"determination of eligibility" form characterizing P.R. as ineligible for DEJ due to a prior violation of probation ("Prior VOP").

On May 4, 2009, the district attorney filed a first amended subsequent juvenile wardship petition against P.R. (May 4th petition) alleging commission on April 8, 2009, of four felonies – criminal threats with personal use of a deadly weapon, to wit, a knife (counts 1 & 2; §§ 422, 12022, subd. (b)(1)) and assault with a deadly weapon, to wit, a knife (counts 3 & 4; § 245, subd. (a)(1)) – and one misdemeanor – vandalism (count 5; § 594, subd. (a)(2)). In a three-day contested jurisdictional hearing ending on May 6, 2009, the juvenile court, after dismissing counts 2, 4, and 5, found true the criminal-threats allegation in count 1, the personal-use-of-a-deadly-weapon allegation in count 1, and the assault-with-a-deadly-weapon allegation in count 3.

On May 20, 2009, P.R. was adjudged a ward of the juvenile court, which found the criminal threats and the assault with a deadly weapon to be felonies and committed P.R. to the New Horizons Program for 365 days.

DISCUSSION

1. Sustained Fear

P.R. argues, the Attorney General agrees, and we concur that an insufficiency of the evidence of the "sustained fear" element of criminal threats requires reversal of the judgment as to criminal threats with personal use of a deadly weapon. (See *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.)

2. Self-Defense

P.R. argues that an insufficiency of the evidence of the absence of lawful self-defense requires reversal of the judgment as to assault with a deadly weapon. The Attorney General argues the contrary.

The prosecution has the burden of proof beyond a reasonable doubt that the defendant did not act in lawful self-defense. (CALCRIM No. 3470.) "For self-defense,

the defendant must actually and reasonably believe in the need to defend, the belief must be objectively reasonable, and the fear must be of imminent danger to life or great bodily injury." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1427.) Any right of self-defense is limited to the use of such force as is reasonable under the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.)

Here, the sole eyewitness who testified at the jurisdictional hearing was a resident of the neighborhood. He walked outside and saw his neighbor from two houses away holding a rake and defending himself against P.R., whose hand held a knife. His neighbor was standing "in a defensive posture," holding the "dead center of the rake," but neither "swinging [the rake] like a baseball bat" nor "doing anything [else] to cause [P.R.] harm." P.R. kept "attacking" him as his neighbor kept "back pedaling towards the back yard," without ever attempting to strike P.R. with the rake. Moving the knife "back and forth slashing and a stabbing trying to get at [him]," P.R. advanced to within two feet of his neighbor but never got closer because his neighbor created a "safe distance" with the rake.

P.R. argues that "the alleged victim did not testify," did not "call law enforcement," and did not "attempt to leave the residence in response to P.R.'s actions," and no one "testified to what the commotion was prior to [the neighbor] making his observations," so the record "is not clear what prompted or precipitated P.R.'s assault." A "strong inference could be drawn from the evidence," P.R. argues, "that the altercation broke out some time before [the neighbor's] observations, which could very well have been the basis of P.R. defending himself against the alleged victim."

The flaw in P.R.'s argument is the lack of substantial evidence of self-defense in the record. If substantial evidence warrants instruction on self-defense, the prosecution has the burden of proof beyond a reasonable doubt that the defense does not apply. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341; *People v. Pineiro* (1982) 129 Cal.App.3d 915, 920; *People v. Banks* (1976) 67 Cal.App.3d 379, 384.) Substantial

evidence means evidence of a defense that is sufficient for a reasonable trier of fact to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.) On the record here, P.R.'s argument asks us to conflate rank speculation and substantial evidence. We decline to do so.

3. Deferred Entry of Judgment

P.R. argues that the juvenile court's failure to consider DEJ requires a remand for abuse of discretion. The Attorney General argues that P.R. was statutorily ineligible for DEJ.

Welfare and Institutions Code section 790 sets out six statutory criteria of DEJ eligibility, two of which – the enumerated offenses criterion and the probation revocation criterion, respectively – are at issue here (Welf. & Inst. Code, § 790, subds. (a)(2), (a)(4)):

> "(2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] … [¶]
>
> "(4) The minor's record does not indicate that probation has ever been revoked without being completed."

With reference to the probation revocation criterion, P.R.'s record shows a violation of probation, a revocation of probation, and a reinstatement of probation, all on December 12, 2007, and a formal termination of probation on December 12, 2008, with no other probation revocation in the record. So P.R.'s record, which "does not indicate that probation has ever been revoked *without being completed*," satisfies the probation revocation criterion. (Welf. & Inst. Code, § 790, subd. (a)(4), italics added.)

With reference to the enumerated offenses criterion, the Attorney General observes that the May 4th petition alleged the commission of an "assault with a deadly weapon," an offense he argues is "a violation specifically enumerated in Welfare and Institutions Code section 707." The statute, however, lists assault by any means of force

likely to produce great bodily injury but not assault with a deadly weapon. (Welf. & Inst. Code, § 707, subd. (b)(14).) Yet the omission is immaterial. Since a deadly weapon is one likely to produce death or great bodily injury, assault with a deadly weapon necessarily includes assault by any means likely to produce great bodily injury. (*In re Pedro C.* (1989) 215 Cal.App.3d 174, 182.) So the assault with a deadly weapon allegation in the May 4th petition disqualifies P.R. from DEJ eligibility by the enumerated offenses criterion. (Welf. & Inst. Code, § 790, subd. (a)(2).)

P.R. concedes statutory ineligibility for DEJ on the basis of the May 4th petition but argues the juvenile court nonetheless erred by failing to consider DEJ on the basis of the April 10th petition since none of its allegations ran afoul of the enumerated offenses criterion. From the time of the filing of the April 10th petition to the time of the filing of the May 4th petition, the record shows no mention by anyone at any time of eligibility or ineligibility for DEJ – not during arraignment on the April 10th petition; not during plea negotiations on that petition (when the district attorney offered felony criminal threats with personal use of a deadly weapon, P.R.'s attorney offered misdemeanor criminal threats, and both counsel rejected each other's offers); not during a subsequent continuance (when the district attorney informed P.R.'s attorney that his offer, though still open, was to expire days later with the filing of an amended petition alleging assault with a deadly weapon); and not during arraignment on the May 4th petition (which made P.R. statutorily ineligible for DEJ). Since the May 4th petition superseded the April 10th petition, a remand would be an idle act. (*Walton v. Guinn* (1986) 187 Cal.App.3d 1354, 1360; Code Civ. Proc., § 472; Welf. & Inst. Code, § 348; Cal. Rules of Court, rule 5.524(d).) "The law neither does nor requires idle acts." (Civ. Code, § 3532.)

DISPOSITION

Solely as to criminal threats with personal use of a deadly weapon (count 1), the judgment is reversed and the matter is remanded to the juvenile court with directions to issue appropriately amended orders. In all other respects the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Cornell, Acting P.J.

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Kane, J.